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Stephen J. Maggio

Michael A. Maggio

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CIVIL LIABILITY UNDER THE FDCPA FOR UNAUTHORIZED PRACTICE OF LAW

*Stephen J. Maggio**
*Michael A. Maggio***

I. INTRODUCTION

Collection agencies, debt collectors and the attorneys representing them, have become a part of every day commerce in the United States. Traditionally, they provide an important service to corporate America. Many collectors and attorneys are ethical and take great strides to comply with the law. Sadly, however, many collectors and their attorneys intentionally violate the consumer protection laws or unknowingly violate the law because they are unwilling to take the time to educate themselves. Because of these unethical and illegal actions, Congress and several states have greatly expanded the applicability of consumer protection laws, and thereby, the liability for violating them. Many states now have unfair or deceptive practices acts, laws concerning debt adjustment, and laws regulating collection agencies. Areas in which many collection agencies and attorneys may be in violation of the law include the unauthorized practice of law, and laws concerning champerty and maintenance. In most states, violation of these laws can result in the imposition of damages, treble damages, attorney's fees, costs, injunctive relief, and, in certain cases, criminal penalties including incarceration and fines.

* Stephen J. Maggio received his J.D. from the Cumberland School of Law in 1988 where he served as articles editor of the *American Journal of Trial Advocacy* from 1987 to 1988. He practices law in Gulfport, Mississippi and is also licensed in Alabama. He has a general practice with a strong emphasis in representing consumers. In 1996 he was appointed as a Judge to the Municipal Court of the City of Gulfport, Mississippi.

** Michael A. Maggio received his J.D. from the University of Arkansas at Little Rock in 1989. He is a member of the Arkansas Bar Association, Debtor/Creditor Committee, and the Unauthorized Practice of Law Committee, the Commercial Law League of America, Creditor Rights Section. He is past president of the Faulkner County Bar Association. He is also a frequent lecturer on collection rights for creditors. His practice is primarily limited to the representation of creditors for the collection of delinquent receivables. He serves as Small Claims Referee and Special Municipal Judge for Faulkner County. [Authors' Note: For more information regarding this topic, please see the following recent case regarding collection agencies and the unauthorized practice of law: *Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. A-1 Associates, Inc.*, No. 33002 (Iowa D. Ct. Mar. 3, 1999) (finding that a debt collection agency engaged in the unauthorized practice of law when it represented creditors in small claims court using an assignment of accounts under which the creditors receive the proceeds of any recovery less a fixed percentage retained by the debt collection agency as compensation for its services).]

II. FAIR DEBT COLLECTION PRACTICES ACT—GENERAL PROVISIONS

In 1977, the Congress of the United States enacted the Fair Debt Collection Practices Act [FDCPA].¹ In enacting this legislation, Congress specifically noted that the existing laws were inadequate to protect consumers.² The FDCPA was intended to promote consistent laws to protect consumers.³ The overall thrust of the law was to prevent misleading, abusive, and deceptive practices in collecting debts.⁴ Since its enactment over twenty years ago, the law has remained essentially unchanged; however, for our purposes, there have been two important amendments to the FDCPA. First, in 1986 Congress removed the exemptions for attorneys.⁵ Second, in 1996 Congress exempted formal legal pleadings from the requirement of having to include the "Mini-Miranda" warning.⁶

III. THE FDCPA REGULATES "DEBT COLLECTORS"

"Debt collector" is a term of art under the FDCPA, defined by 15 U.S.C. § 1692a(6). In *Tolentino v. Friedman*,⁷ the court held:

[The] FDCPA . . . § 1692a(6) regulates the activities of a debt collector, which is defined as: "Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect directly or indirectly, debts owed or due or asserted to be owed or due another."⁸

The definition of "debt collector" includes two major groups of people: (1) those whose principal business is the collection of debts; and, (2) those who, while not principally engaged in the collection of debts, nonetheless regularly collect or attempt to collect debts owed to another.⁹ This second part of the definition is particularly applicable to attorneys. Although broad, this definition is not without limits and it is important to read the definition

1. Fair Debt Collection Practices Act of 1977, 15 U.S.C. § 1692 (1994).

2. See 15 U.S.C. § 1692b.

3. See 15 U.S.C. § 1692b-1692e.

4. See 15 U.S.C. § 1692e.

5. See 15 U.S.C. § 1692a(6)(F) (Supp. 1996).

6. See 15 U.S.C. § 1692e(11) (Supp. 1996).

7. 46 F.3d 645 (7th Cir. 1995).

8. *Id.* (citing *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994)).

9. 15 U.S.C. § 1692a(6).

completely. It does not include collection of a debt which is not in default at the time it is turned over to the collector.¹⁰

In many instances, creditors are exempt from the application of the FDCPA because they are attempting to collect a debt owed to themselves.¹¹ 15 U.S.C. § 1692a(6)(A) exempts “any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.”¹² However, this exemption is not absolute. The FDCPA has been held to apply to a creditor using a name other than its own to suggest the involvement of a third-party collector.¹³ A trend is developing in certain cases, where the focus is the relationship between the creditor and collector. If it is determined that the collector is the agent of the creditor as opposed to an independent contractor, then liability may attach to the creditor. These cases have relied on the general principals of agency law.¹⁴

Prior to 1986, attorneys were specifically exempted from the definition of debt collector set forth under 15 U.S.C. § 1692a(6).¹⁵ As mentioned above, Congress deleted this exemption in 1986, thus subjecting attorneys who otherwise would meet the criteria for being a debt collector to the requirements of the FDCPA.¹⁶ Other courts both before and since *Heintz* have followed this same rationale.¹⁷ In determining the amount of collection activity

10. See 15 U.S.C. § 1692a(7).

11. See 15 U.S.C. § 1692a(6)(F) (Supp. 1996).

12. 15 U.S.C. § 1692a(6)(A).

13. See *Denker v. United Compucred Collections, Inc.*, No. 94-C-1817, 1996 WL 724784, at *1 (N.D. Cal. Nov. 27, 1996) (discussing whether an issue of fact existed as to whether the utility company-creditor was liable); *Fratto v. Citibank, N.A.*, No. C-96-2946 MHP, 1996 WL 554549, at *1 (N.D. Ill. Sept. 25, 1996) (issue of fact as to whether Citibank liable under FDCPA). Other courts have held that a creditor may not escape liability under the FDCPA if it is using a corporate subsidiary as a collection agency. See *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Phillips v. Periodical Publishers' Serv. Bureau, Inc.*, 369 S.E.2d 154 (S.C. Ct. App. 1988), *rev'd*, 388 S.E.2d 787 (S.C. 1989). Cf. *Meads v. Citicorp Credit Servs., Inc.*, 686 F. Supp. 330, 334 (S.D. Ga. 1988) (holding that no violation occurred where a subsidiary only collected for the parent and where it disclosed its subsidiary relationship on its letterhead).

14. See, e.g., *Howe v. Reader's Digest Ass'n, Inc.*, 686 F. Supp. 461 (S.D.N.Y. 1988) (holding that a magazine retailer would not be liable absent proof of agency relationship); *Jacksonville State Bank v. Barnwell*, 481 So. 2d 863 (Ala. 1985) (finding facts sufficient for jury to find repossessor to be agent of bank); *Rochester-Hall Drug Co. v. Bowden*, 118 So. 674 (Ala. 1928) (inferring that creditor participated in false imprisonment of the debtor).

15. See 15 U.S.C. § 1692a(6)(F) (Supp. 1977).

16. See *Heintz v. Jenkins*, 514 U.S. 291 (1995), *cert. denied*, 118 S. Ct. 1304 (1998).

17. See *Garrett v. Derbes*, 110 F.3d 317 (5th Cir. 1997) (holding that attorney who, during a nine month period, attempted to collect debts from 639 different individuals was “regularly” attempting to collect debts); *Crossley v. Lieberman*, 868 F.2d 566 (3rd Cir. 1989) (holding that attorney who “regularly” collected debts for others to be debt collector—attorney had filed 22 foreclosure actions within an eighteen month period); *Sluys v. Hand*, 831 F. Supp. 321, 323 (S.D.N.Y. 1993) (finding FDCPA applies to attorney “reg.” collecting debt).

necessary to trigger a claim, the court in *Cacace v. Lucas*¹⁸ held that “regularly” means steady, or uniform in course, practice or occurrence.¹⁹ It matters not that the activity is legal in nature.²⁰ However, it should be remembered that the 1996 amendments to the FDCPA specifically exempted legal pleadings from the requirement that collection notices contain the “Mini-Miranda” warning telling consumers that they are attempting to collect a debt and that any information sent in response would be used to collect the debt.²¹

IV. THE FDCPA COVERS A BROAD SPECTRUM OF TRANSACTIONS

“The term ‘debt’ means any obligation . . . arising out of a transaction in which the . . . services which are the subject of the transaction are primarily for personal, family or household purposes”²² In general, the initial question to be asked when evaluating a claim of whether the dispute is a “debt” for the purposes of the FDCPA is whether the transaction was for personal or household purposes. Commercial debts and transactions are not covered by the FDCPA. Courts considering this question have typically given a broad reading to the term. Many everyday occurrences fall under the coverage of the FDCPA. The following are examples of transactions covered by the FDCPA: medical bills;²³ rent;²⁴ utility bills;²⁵ bills for forced place insurance premiums;²⁶ and student loans.²⁷ When assessing loan transactions, however, caution needs to be used as the loan is not in default in many instances when the collection activity occurs and the collector would, therefore, not be included in the definition of a “debt collector” under the

18. 775 F. Supp. 502, 504-05 (D. Conn. 1990).

19. *See id.*

20. *See Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103 (6th Cir. 1996) (holding that attorneys engaged in litigation were “debt collectors” subject to FDCPA); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992) (holding that the FDCPA applies to attorneys even where activity is purely legal).

21. *See* 15 U.S.C. § 1692e(11) (Supp. 1996).

22. 15 U.S.C. § 1692a(5).

23. *See Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989); *Adams v. Law Office of Stuckert & Yates*, 926 F. Supp. 521 (E.D. Pa. 1996); *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981).

24. *See Poirier v. Alco Collections, Inc.*, 107 F.3d 347 (5th Cir. 1997); *Emanuel v. American Credit Exch.*, 870 F.2d 805 (2nd Cir. 1989); *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992).

25. *See Britton v. Weiss*, No. 89-CV-143, 1989 WL 148663 (N.D.N.Y. Dec. 8, 1989) (concerning collection of a telephone bill)

26. *See Heintz v. Jenkins*, 514 U.S. 291 (1995), *cert. denied*, 118 S. Ct. 1304 (1998).

27. *See Juras v. Aman Collection Serv., Inc.*, 829 F.2d 739 (9th Cir. 1987).

FDCPA.²⁸ One other area of debate concerns dishonored checks. Some courts in the past held that a dishonored check was not a "debt" because it did not involve an extension of credit.²⁹ However, most courts held they were "debts" under the FDCPA.³⁰ The more recent cases hold that they are debts and that the extension of credit is not a prerequisite to the invocation of the FDCPA. In *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*,³¹ the court held that a dishonored check was covered under the FDCPA where the check had been written to purchase household goods, irrespective of the extension of credit.³²

V. STANDARD OF LIABILITY

The FDCPA is a strict liability statute.³³ Under its provisions, a single violation is sufficient to establish liability.³⁴ The statute is remedial and broadly interpreted to effect the intent of Congress.³⁵ In other words, intent to violate the act is not necessary. Although almost all courts determine whether a communication violates the FDCPA by using the "least sophisticated consumer" standard,³⁶ the fact that the debtor is a sophisticated person is not relevant. For example, in *Strange v. Wexler*,³⁷ the court applied the "least sophisticated" consumer standard even though the consumer was an attorney. The United States Court of Appeals for the Fifth Circuit has refused to adopt either the "unsophisticated" or "least sophisticated" standard. Although the matter has been twice visited by the Fifth Circuit, it has avoided

28. See 15 U.S.C. § 1692b(6)(F)(iii).

29. See *Perez v. Slutsky*, No. 94-C-6137, 1994 WL 698519, at *1 (N.D. Ill. Dec. 12, 1994).

30. See *Narwick v. Wexler*, 901 F. Supp. 1275 (N.D. Ill. 1995); *Holmes v. Telecredit Serv. Corp.*, 736 F. Supp. 1289 (D. Del. 1990); *West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983).

31. 111 F.3d 1322 (7th Cir. 1997).

32. See *id.* at 1323. See also *Snow v. Riddle*, 143 F.3d 1350 (10th Cir. 1998); *Charles v. Lundgren & Assocs., P.C.*, 119 F.3d 739 (9th Cir. 1997); *Byes v. Telecheck Recovery Serv., Inc.*, No. CIV-A-94-3182, 1997 WL 736692, at *1 (E.D. La. Nov. 24, 1997).

33. See *Teng v. Metropolitan Retail Recovery, Inc.*, 851 F. Supp. 61, 65 (E.D.N.Y. 1994); *Woolfolk v. Van Ru Credit Corp.*, 783 F. Supp. 724, 725 (D. Conn. 1990); *Cavallaro v. Law Office of Shapiro & Kreisman*, 933 F. Supp. 1148 (E.D.N.Y. 1996).

34. See *Teng*, 851 F. Supp. at 65; *Woolfolk*, 783 F. Supp. at 725; *Cavallaro*, 933 F. Supp. at 1148. See also *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997).

35. See *Hientz v. Jenkins*, 514 U.S. 291 (1995); *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992); *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984).

36. *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62 (2nd Cir. 1993); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2nd Cir. 1993); *Moore v. Ingram & Assocs., Inc.*, 805 F. Supp. 7, 9 (D.S.C. 1992); *Rosa v. Gaynor*, 784 F. Supp. 1, 3 (D. Conn. 1989); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1173 (11th Cir. 1985).

37. See *Strange*, 796 F. Supp. 117 (N.D. Ill. 1992).

adopting a particular standard by concluding that the particular communications at issue would have violated either standard.³⁸

VI. UNAUTHORIZED PRACTICE OF LAW AND CHAMPERTY AND MAINTENANCE

Almost every state has some statutory framework to regulate the practice of law which makes it illegal for lay persons to practice law. As will be discussed below, a contract made in violation of the law is illegal and may be held to be void *ab initio*, in other words, null, void, and unenforceable. Also, almost every state has adopted some ethical rule, either the ABA Model Rules on Professional Conduct or the older ABA Code of Professional Conduct, both of which prohibit a lawyer from assisting a layperson in practicing law. ABA Model Rule of Professional Conduct 5.5(b) prohibits a lawyer from "assist[ing] a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."³⁹ In an ethics opinion, the Mississippi Bar Association determined that it would violate the rule on assisting the unauthorized practice of law for a law firm to take cases which had been previously solicited by a non-lawyer "referral" service despite the fact that the referral service was a separate corporate entity which provided services to the injured parties.⁴⁰ In Arkansas and many other states, laws against the unauthorized practice of law are criminal in nature.⁴¹ Also, many jurisdictions, Arkansas included, have laws or rules which prohibit a corporate officer or employee of a creditor or collector from representing that company unless that person is licensed to practice law.⁴² Although some courts hold that these statutes do not create a private right of action, many courts recognize that the court has inherent authority to regulate the practice of law.⁴³ At least one court allowed a class action as a means to enjoin the unauthorized practice of law.⁴⁴ It is helpful to bear in mind that when federal

38. See *McKenzie v. E.A. Uffman & Assocs., Inc.*, 119 F.3d 358 (5th Cir. 1997); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997).

39. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(b) (1980).

40. Mississippi Bar Assoc., Formal Op. 209 (1993).

41. See, e.g., ARK. CODE ANN. § 16-22-211 (Michie 1987); MISS. CODE ANN. § 73-3-55 (1972).

42. See, e.g., *Merco Constr. Eng'rs Inc. v. Municipal Ct. for Long Beach Judicial Dist.*, 581 P.2d 636 (Cal. 1978); *Remole Soil Serv., Inc. v. Benson*, 215 N.E.2d 678 (Ill. App. Ct. 1966).

43. See *Smith v. National Cashflow Sys., Inc.*, 309 Ark. 101, 827 S.W.2d 146 (1992); *Davis v. University of Arkansas Med. Ctr. & Collection Serv.*, 262 Ark. 587, 559 S.W.2d 159 (1977); *Whelchel v. Stennett*, 5 So. 2d 418 (Miss. 1942).

44. See *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587 (D.C. 1973).

courts interpret the FDCPA, they have consistently held that Congress intended for the FDCPA to be enforced by private attorneys general.⁴⁵

Another legal principle which bears consideration in this context is the common law principle of champerty and maintenance. Champerty consists of "any agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation."⁴⁶ The elements of champerty are defined as: (1) an agreement;⁴⁷ (2) to defray, in whole or in part, the expenses of another's suit;⁴⁸ (3) by the latter person to divide with the former the fruits of litigation in the event it proves successful.⁴⁹ It is not essential that an action be pending at the time of the contract, it is only essential that litigation be contemplated.⁵⁰ It is essential that a lawsuit exist for maintenance to apply.

While champerty is the intermeddling of a stranger in litigation of another for profit, maintenance is the financing of such litigation. The laws against champerty and maintenance are aimed at preventing speculation in lawsuits.⁵¹ In many states, there are separate criminal provisions prohibiting champerty and maintenance.⁵² These statutes generally grant attorneys an exemption in taking cases on a contingency fee basis.⁵³

In many instances, when looking at the question of champerty, courts have focused on the fact that the statutes were intended to prevent strangers from meddling or trafficking in litigation. An instructive case on champerty and maintenance is the recent decision in *Sneed v. Ford Motor Company*.⁵⁴ In the *Sneed* case, Ms. Sneed and others had been injured when the Ford truck in which they were riding rolled over several times. The insurers, United States Fire Insurance and National Union Fire Insurance Company, paid Ms. Sneed and others \$5,000,000 and secured an agreement with them to sue Ford Motor Company.

45. See *Knight v. Snap-On Tools Corp.*, 3 F.3d 1398, 1405 (10th Cir. 1993); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2d Cir. 1993); *Clomon v. Jackson*, 988 F.2d 1314, 1318-1320 (2d Cir. 1993); *Russey v. Rankin*, 837 F. Supp. 1103, 1105 (D.N.M. 1993); *Cirkot v. Diversified Fin. Sys.*, 839 F. Supp. 941, 944 (D. Conn. 1993).

46. 14 C.J.S. *Champerty and Maintenance* § 1 (1991).

47. See *Clancy v. Kelly*, 166 N.W. 583 (Iowa 1918).

48. See *Clark v. Harrison*, 184 S.E. 620 (Ga. 1936).

49. See *Wyman-Gordon Co. v. Lynch Area Fire Protection Dist.*, 366 N.E.2d 1055 (Ill. App. Ct. 1977); *Clark v. Harrison*, 184 S.E. 620 (Ga. 1936).

50. See *Roberts v. Yancey*, 21 S.W. 1047 (Ky. Ct. App. 1893).

51. See *Berlin v. Nathan*, 381 N.E.2d 1367 (Ill. App. Ct. 1978).

52. See, e.g., MISS. CODE ANN. § 97-9-11 (1972).

53. See, e.g., MISS. CODE ANN. § 97-9-11.

54. No. 97-CA-0922-SCT, 1999 WL 174255, at *1 (Miss. Mar. 31, 1999).

Ford countered the suit with a claim that the agreement was champertous. The insurers responded, in part, by claiming that they had a written assignment of the claim.⁵⁵ On appeal, Ford contended that not only must the agreement pass muster under the assignment statute, but it must also avoid being champertous. The Mississippi Supreme Court agreed, stating "Ford argues that the fact that Mississippi allows assignment of causes of action does not mean that assignments can never be champertous. Its argument is that the assignment must not only satisfy the requirements of the assignment statute, but the assignment must also avoid champerty. We agree."⁵⁶

The court indicated that the question was who was the real party in interest. The court made reference to its earlier decision in *Fry v. Layton*,⁵⁷ where it held that it was champertous for a total stranger to a contract to pay only nominal consideration for the purpose of suing on the notes in his own name. The court distinguished *Fry* with *Stephen R. Ward, Inc. v. United States Fidelity & Guaranty Co.*,⁵⁸ where an insured and mortgage loss payee sued the carrier when the carrier failed to pay for a fire loss. The Mississippi Supreme Court noted that the contract was not champertous because the parties, i.e. the Wards and Pine Belt Mortgage Company, were not strangers to the transaction giving rise to the claim.

The *Sneed* court defined the issue of champerty as being encompassed by the question of whether the person pursuing the cause was a real party in interest. The test, according to the *Sneed* court, is whether the "[p]erson . . . [is] . . . entitled to the benefits of the action if successful, that is, the one who is actually and substantially interested in subject matter *as distinguished from one who has only a nominal, formal, or technical interest in or connection with it.*"⁵⁹

The court concluded that the contract between Ms. Sneed and the insurers was not champertous.

This case is distinguishable from [*Fry, supra*], where a champertous stranger brought other borrowers' claims Therefore, we conclude that the Insurers are not strangers to the present litigation, but in fact have real interests in not bearing the full costs of the Plaintiffs' injuries in circum-

55. See MISS. CODE ANN. § 11-7-3 (1972) (providing that the assignee of chose in action can sue in its own name).

56. *Sneed*, 1999 WL 174255, at *6.

57. 191 Miss. 17, 2 So. 2d 561 (1941).

58. 681 F. Supp. 389 (S.D. Miss. 1988).

59. *Sneed*, 1999 WL 174255, at *7 (citing BLACK'S LAW DICTIONARY 874 (6th ed. 1990)) (emphasis added).

stances where a non-settling tortfeasor potentially shares fault for these injuries.⁶⁰

The Mississippi Supreme Court then noted, “[i]f we had determined the agreement at issue to be champertous, then it would have been a void contract under the laws of the State of Mississippi.”⁶¹

Similar to other states, Arkansas has dealt with the issue of the unauthorized practice of law statutorily. The Arkansas Code contains a very broad prohibition against lay persons and non-legal corporations practicing law.⁶² Arkansas Code Annotated section 16-22-211 provides the following:

- (a) *It shall be unlawful for any corporation . . . to . . . tender or furnish legal services of any kind in actions or proceedings of any nature or in any other way or manner to . . . convey the impression that it is entitled . . . to furnish legal . . . service, or counsel*
- (b) It shall also be unlawful for any corporation or voluntary association to solicit itself by or through its officers, agents, or employees, any claim or demand for the purpose of bringing an action thereon or . . . for furnishing legal . . . services, or counsel . . . for the purpose of so representing any person in the pursuit of any civil remedy.⁶³

In 1997, the Arkansas Legislature passed Act 1301 entitled “An Act to Define the Unauthorized Practice of Law and to Set Penalties; and for Other Purposes.”⁶⁴ Act 1301 serves as a supplement to the previous prohibitions listed in Arkansas Code Annotated § 16-22-211, and makes the violation of the law a Class A misdemeanor.⁶⁵ Under the Act, it is illegal for any person to “enter[] into any contract with another person to represent that person in . . . property damage matters on a contingent fee basis *with an attempted assignment of a portion of the person’s cause of action*[.]”⁶⁶ Furthermore, it is illegal to “enter [] into any contract, except a contract of insurance, with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding[.]”⁶⁷

60. *Id.*

61. *Sneed*, 1999 WL 174255, at *10 (emphasis added).

62. See ARK. CODE ANN. § 16-22-211 (Supp. 1997).

63. *Id.* (emphasis added).

64. 1997 Ark. Acts 1301 (codified as ARK. CODE ANN. § 16-22-211 1(a)(4) (Supp. 1997)).

65. See 1997 Ark. Acts 1301 (codified as ARK. CODE ANN. § 16-22-211 1(a)(4) (Supp. 1997)).

66. 1997 Ark. Acts 1301 (codified as ARK. CODE ANN. § 16-22-211 1(a)(4) (Supp. 1997)). (emphasis added).

67. 1997 Ark. Acts 1301 (codified as ARK. CODE ANN. § 16-22-211 1(a)(4)-(5) (Supp. 1997)).

At least two cases in this state have dealt with the issue of unauthorized practice of law in the context of debt collection. In *Davis v. University of Arkansas Medical Center and Collection Service, Inc.*,⁶⁸ the medical center sued Mr. Davis on a \$405.80 hospital bill. Davis answered claiming, among other things, that the medical center was engaged in the unauthorized practice of law. The trial court entered a judgment against Mr. Davis. On appeal, the Arkansas Supreme Court reversed, after concluding that the trial court had prematurely entered a judgment against the defendant. In reaching its decision, the Arkansas Supreme Court held:

Neither can we agree with appellees' [the medical center] argument that the alleged affirmative defense of the unauthorized practice of law constitutes a counterclaim against the state in violation of Art. 5, 10, Ark. Const. (1874) which clothes the state with immunity from being a defendant in her own courts *Appellant, as a litigant, has standing to question CSI's authority to practice law.*⁶⁹

The Arkansas Supreme Court confirmed in *Smith v. National Cashflow Systems, Inc.*,⁷⁰ that a debtor has standing to question the relationship of the collector and creditor in the context of the issue of the unauthorized practice of law. The court stated "[a]s to Mr. Smith's complaint that CashFlow was engaged in the unauthorized practice of law, we note that as a litigant in the action, Mr. Smith has standing to raise the issue as a defense."⁷¹ The Arkansas Supreme Court did not decide the issue of whether CashFlow had engaged in the unauthorized practice of law. "In short, based on the meager facts in the record, we cannot reach the question of whether CashFlow was engaged in the unauthorized practice of law."⁷² As such, the question in Arkansas remains undecided; however, the Arkansas Supreme Court cautioned that the providing or furnishing of services or counsel might well constitute the unauthorized practice of law.⁷³

As stated earlier, in some instances, where unauthorized practice of law has been raised as a defense, the creditor, collector and their attorneys have responded by claiming that the prosecutor is the only office cloaked with the enforcement of criminal laws regarding the unauthorized practice of law. The

68. 262 Ark. 587, 559 S.W.2d 159 (1977).

69. *Id.* at 590, 559 S.W.2d at 161 (citing *McKenzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973)) (emphasis added). The Arkansas Supreme Court reversed and remanded the case to allow Mr. Davis the opportunity to provide proof on his allegation of unauthorized practice of law. On remand, the case settled.

70. 309 Ark. 101, 827 S.W.2d 146 (1992).

71. *Id.* at 104, 827 S.W.2d at 148.

72. *Id.*, 827 S.W.2d at 148.

73. *See id.*, 827 S.W.2d at 148.

Arkansas Supreme Court has rejected this argument, and in *Mays v. Neal*⁷⁴ held that it had the inherent constitutional authority to rule on issues regarding the regulation of the practice of law.⁷⁵ The court stated that the prohibition against unauthorized practice served to protect the public.⁷⁶ In *Udem v. State Board of Law Examiners*,⁷⁷ the Arkansas Supreme Court enjoined a bank from employing attorneys to draft or modify testamentary instruments for the customers of the bank holding that it violated the laws concerning the unauthorized practice of law.⁷⁸ The Arkansas Supreme Court held that the lawyers could only represent the bank itself and not the customers, notwithstanding the trust relationship between the bank and its customers.⁷⁹

As such, the statutes and case law of Arkansas make it abundantly clear that persons or businesses not licensed to practice should not contract to provide or furnish counsel, pay court costs, or file complaints. Contracts by non-lawyers concerning such matters can certainly be challenged by debtors in court and may, if supported by proof, be held to be invalid. However, this would not invalidate the debt, only the contract by which the collector seeks to enforce the debt.⁸⁰

In applying these principles to the FDCPA it bears in mind to remember that the FDCPA contains a prohibition against debt collectors taking an action that they legally cannot take.⁸¹ An instructive case on the interplay of state unauthorized practice of law statutes and the the FDCPA is the recent decision of *Poirier v. Alco Collections, Inc.*⁸² The United States Court of Appeals for the Fifth Circuit followed the Louisiana Court of Appeals, and held that a collection agency violated the FDCPA's prohibition against taking or threatening to take any action which is not authorized by law when the collector sued in its own name based on an alleged assignment from the creditor.⁸³ The debtor had successfully defended the collections complaint in the Louisiana Court of Appeals, where the Louisiana court held that the collection agency had violated Louisiana's law against the unauthorized practice of law.⁸⁴ In reaching its decision, the Louisiana Court of Appeals focused heavily on the fact that the assignment was a "sham" transaction

74. 327 Ark. 302, 938 S.W.2d 830 (1997).

75. *See id.*

76. *See id.*

77. 266 Ark. 683, 587 S.W.2d 563 (1979).

78. *See id.*

79. *See id.*

80. *See Smith v. National Cashflow Sys.*, 309 Ark. 101, 827 S.W.2d 146 (1992).

81. *See* 15 U.S.C. § 1692e(5) (1994).

82. 107 F.3d 347 (5th Cir. 1997).

83. *See* 15 U.S.C. § 1692e(5).

84. *See Alco Collections, Inc. v. Poirier*, 680 So. 2d 735 (La. Ct. App. 1996).

because no consideration was paid for the assignment and the creditor retained control over the account and the litigation. In another FDCPA case, a court held that there was no assignment of the debt where the creditor retained control over the account.⁸⁵ Consequently, it may be a violation of the FDCPA to participate in a scheme in which the collection agency has no real financial interest in the debt.

Moreover, and what should be of particular concern to creditors, is that the Louisiana Court of Appeals held that the contract for collection was "null and void." In other words, the collection agency could not legally enforce the alleged debt.⁸⁶ On appeal, the collection agency had attempted to salvage its case by relying on a Louisiana statute which allowed a collection agency to sue on debts assigned to it by a creditor.⁸⁷ The Louisiana Court of Appeals rejected the argument, holding that there was no valid assignment to begin with.⁸⁸

Many other courts have held that contingent assignments and other arrangements between the creditor and collector are in violation of state laws on the unauthorized practice of law. In *Russey v. Rankin*,⁸⁹ the court held that a collection agency violated FDCPA, despite having authorization from a creditor to sue on a debt where its collection contract allowed a contingency in recovery. In *Kolker v. Duke City Collection Agency*,⁹⁰ the court held the state unauthorized practice of law statute had been violated where the collection agency sued to collect debts on contingency and where the collection agency, not the creditor, hired the attorney. Many other courts have reached similar holdings.⁹¹

85. See *Bieber v. Associate Collection Serv., Inc.*, 631 F. Supp. 1410 (D. Kan. 1986) (holding no assignment where hospital retained ownership of accounts).

86. See *Poirier*, 680 So. 2d at 742-43.

87. See Louisiana Collection Agency Regulation Act (CARA), LA. REV. STAT. ANN. § 9:3576.19 (West 1997).

88. See *Poirier*, 680 So. 2d at 745.

89. 911 F. Supp. 1449 (D.N.M. 1995).

90. 750 F. Supp 468 (D.N.M. 1990).

91. See *Bump v. Barnett*, 16 N.W.2d 579 (Iowa 1944) (holding that collector who took assignments of claims on a contingency basis and hired his own counsel committed violation of unauthorized practice of law statutes, and entering a restraining order); *State Bar of Wisconsin v. Bonded Collections, Inc.*, 154 N.W.2d 250 (Wis. 1967) (holding that collection agency engaged in the unauthorized practice of law by purporting to act on behalf of creditor based on contingency basis and further by hiring and controlling legal counsel); *Nelson v. Smith*, 154 P.2d 634 (Utah 1944) (holding that a layman cannot circumvent the statutes prohibiting the unauthorized practice of law by taking an assignment and proceeding in his own name); *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 514 P.2d 40 (N.M. 1973) (granting an injunction after holding that practice of law included management of litigation, providing and hiring counsel; therefore collector violated state law by taking an assignment of claims and filing suit even though it hired counsel); *J. H. Marshall & Assoc. v. Burleson*, 313 A.2d 587 (D.C. 1973) (holding that contingent fee contract which also called for hiring and

There are various other instances in which a collection agency was cited for unauthorized practice of law, separate and apart from actually filing pleadings and appearing in court. One court held that a collector engaged in unauthorized practice of law when the collector purchased judgments with the intent to sue on them.⁹² Other courts have indicated that unauthorized practice of law may occur when a collection agency offers legal advice⁹³ or collects a third party's claim for an attorney.⁹⁴ In other contexts, a judgment obtained in violation of the laws on unauthorized practice of law was held to be void.⁹⁵

VII. CONCLUSION

In light of the far reaching consequences of being held in violation of any of the above statutes, any attorney encountering a collection agency or its attorney should explore the relationships between the creditor, collector and attorney involved. Effective use of the FDCPA and its protections can give the consumer attorney an advantage to use in negotiating a settlement with the creditor, collector or its attorney. Additionally, those attorneys who are actively involved in the representation of collection agencies, or who might themselves have a financial interest in the collection agency, need to be extremely mindful of the broad interpretation given by the courts on these issues. In the opinion of these authors, it would be better for the lawyer to have a direct contract with the creditor, because almost all states permit lawyers to contract on a contingency fee basis to bring claims.

directing of counsel violated laws against the unauthorized practice of state law): *State v. James Sanford Agency*, 69 S.W.2d 895 (Tenn. 1934) (holding that collector violated state laws by suing on contingent assignment of debt and retaining counsel to assist in such collection). Some courts have held that judgments obtained via mechanisms which constitute the unauthorized practice of law are void. *See, e.g., Bennie v. Triangle Ranch Co.*, 216 P. 718 (Colo. 1923); *Remote Soil Serv., Inc. v. Benson*, 215 N.E.2d 678 (Ill. App. Ct. 1966); *Colton v. Oshrin*, 278 N.Y.S. 146 (1934).

92. *See Bottenus v. Blackman*, 336 N.Y.S.2d 790 (1972). The court also criticized the practice as promoting litigation.

93. *See Pisarello v. Administrator's Serv. Corp.*, 464 So. 2d 917 (La. Ct. App. 1985) (holding collection agency prohibited from giving opinion on when a statute of limitations would run).

94. *See State ex rel. Porter v. Alabama Ass'n of Credit Executives*, 338 So. 2d 812 (Ala. 1976).

95. *See, e.g., Remote Soil Serv., Inc. v. Benson*, 215 N.E.2d 678 (Ill. 1966); *Colton v. Oshrin*, 278 N.Y.S. 146 (1934); *Bennie v. Triangle Ranch Co.*, 216 P. 718 (Colo. 1923).

